SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 893

PUBLIC SERVICE COMMISSION OF THE STATE OF WISCONSIN,

and

CITY OF CHICAGO, A MUNICIPAL CORPORATION OF THE STATE OF ILLINOIS,

Joint Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Joint Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

City of Chicago and Public Service Commission of Wisconsin ("Joint Petitioners") respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on September 8, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals, Docket Nos. 19604 and 19836, decided September 8, 1967 (Appendix A), is not yet reported. Federal Power Commission's Opinions and

Orders (456 and 456-A) in the matter entitled "*Natural Gas Pipeline Company of America,* Docket No. RP61-8" were issued March 18, 1965 and June 23, 1965 respectively (R. 5118-5130, and R. 5199-5205) and its Order granting rehearing of Opinion No. 456 (R. 5198) was issued on May 12, 1965 and its Order denying rehearing of Opinion No. 456-A (R. 5239-5241) was issued on August 6, 1965 and are reported at 33 FPC 574 (1965), 33 FPC 1277 (1965) and 34 FPC 437 (1965).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 8, 1967. The Court of Appeals, on October 31, 1967, granted the Joint Petitioners' Motion for Stay of the transmittal of the opinion and the certified copy of the Court's judgment in case No. 19604 to the Federal Power Commission for a period of thirty (30) days and, in the same Order of October 31, 1967, the Court denied Natural Gas Pipeline Company of America's ("Natural") Petition for Rehearing of the Court's Opinion and judgment in case No. 19836 (Appendix B). Consequently, pursuant to 28 U. S. C. A. Section 2101 (c), the Joint Petitioners have until December 7, 1967 to file their Petition for Writ of Certiorari with the Clerk of the United States Supreme Court.[1]

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. 1254 (1) and Section 19 (b) of the Natural Gas Act.[2]

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1. Act of June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.

2. Act of June 21, 1938, c. 556, § 19, 52 Stat. 831, as amended 15 U. S. C. 717r (b) (1958).

QUESTIONS PRESENTED.

1. Whether the Court erred in sustaining the Federal Power Commission's action in establishing the effective date of the filing of rate schedules and refunds incident thereto as of February 3, 1964, in lieu of March 1, 1961, the date the Joint Petitioners maintain was agreed to by the parties in their Settlement Agreement of June 21, 1962 and which Settlement Agreement was approved by the Commission in Opinion No. 367 issued on October 25, 1962?

2. Whether the Court erred in sustaining the Federal Power Commission's action, which the Joint Petitioners maintain is contrary to the provisions of Section 4(e) of the Natural Gas Act, in ordering the filing of rate schedules, and refunds incident thereto, on that portion of the rates found unjust and unreasonable, to a date other than the date upon which the rates under investigation became effective?

STATUTES INVOLVED.

The relevant parts of the statutes and the amendment to the United States Constitution are set forth in Appendix C. Citations to them are:

1. Administrative Procedure Act, Act of June 11, 1946; c. 324, 60 Stat. 235, 5 U. S. C. § 1000; § 5, 5 U. S. C. § 1004; § 8 (b), 5 U. S. C. § 1007 (b).

2. Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended 15 U. S. C. § 717c; § 5, 15 U. S. C. § 717d; § 19 (b); 15 U. S. C. § 717 (r) (b).

3. Fifth (V) Amendment to the United States Constitution.

STATEMENT OF CASE.

A. Proceeding Before the Commission.

Natural Gas Pipeline Company of America (Natural) and Peoples Gulf Coast Natural Gas Pipeline Company (Peoples Gulf Coast) which was subsequently acquired by Natural on September 29, 1960 (CP 60-97), filed on August 29, 1960 Revised Tariff Sheets which would increase rates effective October 1, 1960. These filings were made under Section 4(e) of the Natural Gas Act and pursuant to said Act were suspended for five months. The increased rates went into effect on March 1, 1961 subject to refund and were duly passed on to Natural's customers. Hearings regarding these increased rates commenced on June 20, 1961.

Subsequent to the conclusion of the Hearings and the filing of its Initial Brief on February 27, 1962, Natural prepared and submitted to the parties to the proceeding, including the Commission's Staff, a Proposal for Settlement of the issues in this proceeding. Following several conferences of the parties, a Stipulation and Agreement to terminate proceedings was prepared by Natural's Attorneys and transmitted to the City's Attorney by cover letter dated May 10, 1962 which letter is set forth as Appendix D. The Stipulation and Agreement was incorporated into the record and made part thereof on June 21, 1962 (R. 4328-9). The Commission accepted and approved this Stipulation and Agreement (hereinafter referred to as "Settlement Agreement") without change by Order issued on October 25, 1962 in Opinion No. 367, set forth as Appendix E. The Settlement Agreement reserved two issues and at the same time approved an immediate refund in excess of $8,800,000.00 to jurisdictional customers

of Natural covering the period from March 1, 1961 when Natural began collecting the filed rates under bond until the date on which the Settlement Agreement became effective.

The Settlement Agreement was entered into by all parties to the proceeding except Intervenors, Fuels Research Council, Inc., United Mine Workers of America, and Mid-West Coal Producers Institute, Inc. They objected to the proposed Settlement Agreement on the ground that the rate design did not enable Natural to recover through the commodity component of its tariff all expenses classified as commodity costs. This issue was resolved by the Commission by Paragraph (B) of Opinion No. 367 (issued October 25, 1962) where it stated:

> "The Settlement of the proceeding in Docket No. RP61-8 as set forth in Natural's proposed Settlement and Agreement is hereby approved and made effective subject to the terms and conditions hereinafter ordered." (Appendix E, p. 64.)

The provisions of the Settlement Agreement which Joint Petitioners deem of critical importance in this petition is appended hereto as Appendix F.

The major issue which was reserved for determination by the Commission as stated in Opinion No. 367 was:

> ". . . whether Natural should 'normalize' its tax expense to eliminate the effect of Internal Revenue Code § 167,26 U. S. C. A. § 167, relating to accelerated depreciation, or should compute its tax expense on the basis of taxes actually paid during the test year (1960). The Settlement provides further that pending our decision on these issues, Natural shall collect revenues subject to refund based upon a 52 per cent tax rate and 'normalized' depreciation." (Appendix E, pp. 58-59.)

On May 11, 1964 (R. 4776-84) the City filed a motion to decide the reserved issue relating to accelerated depreciа-

tion. On May 19, 1964 Natural filed an answer to the City's motion. This answer contained an offer to reduce rates effective October 1, 1965, subject to certain conditions. This rate reduction proposal was unacceptable to the City of Chicago and on July 31, 1964, the Commission ordered that briefs be filed by the parties "on the matters presented by the reserved issue of proper rate treatment of liberalized depreciation under Section IV, Paragraph (2) of the Settlement Agreement in this Docket."

B. The Commission's Opinions.

After briefs and oral arguments, the Commission issued its Opinion No. 456 dated March 18, 1965, set forth as Appendix G in which the Commission:

(a) Ruled that Natural should apply flow-through principle but as of February 3, 1964 rather than Natural's proposed October 1, 1965 date or the City's and Public Service Commission of Wisconsin's date of March 1, 1961 (R. 5126).

(b) Ruled that Natural should also apply the "rate based reduction" principle as of February 3, 1964.

(c) Ruled that the refunds and rate reductions flowing from (a) and (b) need not be effectuated until 30 days after Opinion No. 417 (*Alabama-Tennessee*, case 31 FPC 208, affirmed, 359 F. 2d 318 (C. A. 5), certiorari denied, 385 U. S. 847) becomes final.

On April 16, 1965, timely Application and Petition for Rehearing and Modification of Order and Other Relief of Opinion No. 456, was filed by the City of Chicago as provided by Section 19(a) of the Natural Gas Act (15 U. S. C. § 717r) (R. 5134-63).

On April 19, 1965, the Public Service Commission of Wisconsin timely filed an application for rehearing of Opinion No. 456 by adopting the Application and Petition for Rehearing and Modification of Order and Other Relief filed by the City of Chicago (R. 5192).

On April 19, 1965, Natural filed its Petition for Rehearing of Opinion No. 456 (R. 5164-91).

On May 12, 1965, the Federal Power Commission issued an Order which granted rehearing for the purpose of further consideration of Opinion No. 456 and Order issued March 18, 1965 (R. 5198).

On June 23, 1965, the Commission issued its Opinion No. 456-A set forth as Appendix H, which slightly modified Opinion No. 456 but which still affirmed those findings of Opinion No. 456 which the Joint Petitioners sought rehearing. On July 9, 1965 Natural filed an application for rehearing of Order and Opinion No. 456-A issued on rehearing (R. 5206-23).

On July 23, 1965 the City filed an Application for rehearing of Opinion No. 456-A as provided by Section 19a of the Natural Gas Act (15 U. S. C. § 717r) (R. 5224-38). At the same time, the City filed a Petition for the issuance of a Declaratory Order to Remove an Uncertainty (R. 5233-38). This Petition of the City requested that the Commission reject all Applications for rehearing of Order and Opinion No. 456-A issued on rehearing, since it was the City's position that the Natural Gas Act and the Commission's own rules did not provide for rehearing of Orders issued on rehearing.

On August 6, 1965 the Commission issued an Order in response to the City's aforesaid Petition. The Commission's Order rejected the City's Application for rehearing of Opinion No. 456-A issued on rehearing and partially rejected and partially denied Natural's petition for rehearing of Order and Opinion No. 456-A (R. 5239-41). This rejection by the Commission of the City's Petition for rehearing of opinion and Order 456-A made the order issued on June 23, 1965 a final Order upon which the City and the Public Service Commission of Wisconsin sought

Appeal under Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)).

C. Proceedings in the Court Below.

On August 11, 1965 at 9:00 a.m. E. D. S. T. Joint Petitioners filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit, a Petition for Review of Certain Orders of the Federal Power Commission including Order and Opinion Nos. 456 and 456-A. On August 10, 1965 Natural mailed to the Clerk of the United States Court of Appeals for the Third Circuit, a Petition for Review of Opinion and Order Nos. 456 and 456-A.

The venue question was resolved by court order and on November 9, 1965, the Clerk of the United States Court of Appeals for the District of Columbia Circuit, Nathan J. Paulson, confirmed that the Federal Power Commission had certified and filed the record in Docket No. RP61-8 (Case No. 19604) to that Court.

Upon due consideration of the briefs and oral argument, the Court, on September 8, 1967 issued its decision in cases Nos. 19604 and 19836. Judge Leventhal, speaking for the unanimous Court, affirmed the Commission's Opinions 456 and 456-A which required Natural to flow through to the consumers the Federal Income Tax benefits realized through the use of liberalized depreciation (pages 4-14). The Court reversed the Commission's deduction from Natural's rate base of previously accumulated deferred taxes on the ground that the said issue was not reserved, for determination by the Commission, in the Settlement Agreement (pages 15-20). The Court affirmed the Commission's decision to apply the flow through policy to Natural's rates as of the date of its *Alabama-Tennessee* decision, *i.e.* as of February 3, 1964 in lieu of March 1, 1961 or Oct. 1, 1965 as urged by Joint Petitioners and Natural respectively (page 20 and page 27).

Since the Court reversed the Commission action in deducting from Natural's rate base the previously accumulated deferred taxes, the Court vacated the Commission's Order and remanded the case to the Commission for further proceedings. By motion said remand was stayed.

REASON FOR GRANTING THE WRIT.

On June 21, 1962 the City of Chicago and Natural voluntarily entered into a Settlement Agreement (Section IV (2) of said Settlement Agreement-Appendix F) which the Joint Petitioners maintain was abrogated by the Federal Power Commission in Opinions 456 and 456-A, Docket No. RP61-8, and by the United States Court of Appeals for the District of Columbia Circuit in its decision of September 8, 1967, Nos. 19604 and 19836, in that both the Commission and the Court ruled that the Settlement Agreement did not preclude the Commission from ordering that Natural file reduced rates and make refunds incident thereto for the period commencing on February 3, 1964, the date of the Commission's *Alabama-Tennessee* decision.

The Joint Petitioners contend that the 1962 Settlement Agreement specifically provided for the ordering of rate reductions and refunds to March 1, 1961 on that portion of Natural's rates that were found, by the Commission, to be unjust and unreasonable. However, neither the Commission nor the Court of Appeals could find any language in the Settlement Agreement which would warrant the said contention of the Joint Petitioners. In fact, the Commission in determining the refund period for Natural's inflated rates, stated on page 6 of its Opinion 456:

> "We think the most equitable resolution of this is to put Natural on a par with *Alabama-Tennessee*. We shall therefore order refunds back to February 3, 1964." (Appendix G, p. 75.)

The Joint Petitioners contend that the Commission, under a Section 4(e) proceeding, does not have the statutory authority or power to make its order retroactive to any date which the Commission might feel is equitable to the parties, but that Section 4(e) specifically provides that the retroactivity of the Commission's Order must relate back to the date that the rate change, which was subsequently found unjust and unreasonable, became effective and was collected from the natural gas consumer. See: *United Gas Pipeline Company* v. *Mobile Gas Corporation,* 350 U. S. 332, 341 (1956).

In dealing with this issue the lower Court in this proceeding, on pages 22 and 23 of its decision, asserted:

> "It is argued to us that Section 4(e) 'does not confer equity powers' upon respondent Commission. It may readily be agreed that a commission does not have the same range as an equity court to summon powers to the call of justice. It likewise does not have the power to punish for contempt. However, when an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion." (Appendix A, p. 41.)

By ignoring the explicit language of the Settlement Agreement and by sanctioning the Commission's newly derived equity powers, the Court has endorsed a $34 million bonanza to Natural and thereby has deprived the natural gas consumer of their Constitutional rights under the due process clause of the Fifth (V) Amendment to the United States Constitution.

The Court and the majority of the Commission (Commissioner Black on page 1 of his dissent-Opinion 456, held that Natural should make refunds retroactive to March 1, 1961) have, by their action, placed a shadow on the Settlement Procedure which has been used as a vehicle for

avoiding protracted litigation and will have the effect of encouraging the natural gas pipeline industry to seek rate increases, even though the increases may be questionable or specious, in expectation of an "equitable resolution", identical to the instant case, and which Commissioner Black, on page 3 of his dissent in Opinion 456, aptly describes:

> "The majority justifies the result on 'equitable' grounds. The gas consumers in the Chicago area who are, in the final analysis, being compelled to bestow a windfall of more than $30 million on Natural Gas Pipeline Company of America, will surely be surprised to learn that this constitutes 'equity' in view of the Federal Power Commission." (Appendix G, pp. 82-83.)

A. The Parties Intended and the Settlement Agreement Explicitly Provides for Retroactive Refunds to March 1, 1961, Should the City's Position Be Sustained.

On March 1, 1961 Natural placed into effect increased rates pursuant to revised tariff sheets filed with the Commission on August 29, 1960. Hearings were held before a duly authorized Examiner and in order to resolve certain disputed issues which arose during the course of the proceeding, Natural's Attorney transmitted a letter dated May 10, 1962 to the Corporation Counsel of the City of Chicago to which the Settlement Agreement was attached. The City, upon consideration of the Settlement Agreement as amplified and explained by the cover letter, agreed to the Settlement.

In the third paragraph of the cover letter, Natural's Attorney stated:

> "Natural also agrees to go to trial before the FPC on two issues and if it loses on either, to make *additional refunds* and *rate reductions* (over and above the unconditional ones mentioned above). As you recall, one of these issues which will go to trial—the normaliza-

tion of taxes—is going to trial at your request" (Emphasis supplied by Natural's Attorney). (App. D, p. 55.)

A reading of this paragraph leaves no doubt in the reader's mind that the City of Chicago and Natural intended that they go on trial before the FPC on two issues (one issue being the rate treatment of liberalized depreciation) and if Natural loses on either issue, to make additional refunds which would relate back as the then imminent refunds referred to in paragraph 2, had related back to March 1, 1961.

In order to consummate this Settlement Agreement there had to be a meeting of the minds. This meeting of the minds occurred in 1962 and provided for refunds in the event of a contingency namely, if Natural was not successful in sustaining its position that normalization was the proper rate treatment for the tax benefits of liberalized depreciation for Federal income tax purposes. Clearly, the parties could not have intended that the refunds, if any, would be retroactive to 1964, as the Commission has found, since it was very possible that the entire controversy could have been decided by the Commission in 1963.

The Commission in Opinion 456 states:

"... there is no language in the Settlement Agreement which can fairly be interpreted as requesting us to order refunds retroactive to the date the rate increase was put into effect by Natural." (App. G, p. 72.)

The statement on which the Commission relies is made notwithstanding the language of the Settlement Agreement and the nature of the proceedings, since paragraph 3, Section IV(2) of the Settlement Agreement provides:

"... Natural ... shall make such further refunds with interest at 7% per annum from the 20th day of each month in which each excess payment was collected, to the date Natural refunds such excess payments." (Appendix F, p. 67.)

Since Natural has collected these excess payments resulting from the normalization of the tax benefits of liberalized depreciation since March 1, 1961, it is obvious that rate refunds must be ordered retroactive to that date. The Commission does not have the discretion to modify the Settlement Agreement without the consent of all parties.

It might be noted that the Commission's own Staff agreed that the refunds relating to the use of liberalized depreciation should relate back to March 1, 1961.

B. The Federal Power Commission Exceeded Its Power and Authority Under Section 4(e) of the Natural Gas Act.

This Court has declared as early as the *Hope Natural Gas* case, 320 U. S. 591, 610 (1944) that the primary aim of the Natural Gas Act was:

> "... to protect consumers against exploitation at the hands of Natural Gas Companies;" also *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137, 147 (1960).

This Court has also interpreted the power of the Federal Power Commission under the Natural Gas Act in protecting the consumers as follows:

> "The powers of the Commission are defined by §§ 4(e) and 5(a).... The basic power of the Commission is that given it by § 5(a).... All that § 4(e) does, however, is to add to this basic power in the case of newly changed rates or contracts.... The further powers (1) to preserve the *status quo* pending review of the new rate by suspending its operation for a limited period, and (2) thereafter, *to make its Order retroactive, by the means of the refund procedure, to the date the change became effective.*" (Emphasis supplied.) *United Gas Pipeline Company* v. *Mobile Gas Corporation*, 350 U. S. 332, 341 (1956); and *Federal Power Commission* v. *Hunt*, 376 U. S. 515, 522 (1964).

In establishing the refund period in this proceeding, the Commission on page 6 of its Opinion, stated:

> "We think the most *equitable resolution* of this is to put Natural on a par with *Alabama-Tennessee*. We shall therefore order refunds back to February 3, 1964". . . . (Emphasis supplied.)

In making the foregoing decision, the Commission ignored the fact that this was a Section 4(e) proceeding and that its powers under this section as interpreted by the Supreme Court of the United States do not include the power to make its Order under a section 4(e) proceeding retroactive to any date which the Commission might feel equitable, but specifically relates the retroactivity of the Commission's Order to the date the rate change became effective. *United Gas Pipeline Company* v. *Mobile Gas Corporation, supra.* The date on which the rates became effective in this proceeding was March 1, 1961; therefore the Federal Power Commission lacks the power or authority to make refunds effective on any other date.

Commissioner Black, in his dissent, fully agrees with the position of the City and Public Service Commission of Wisconsin that the refund should relate back to the date when the increased rates went into effect when he asserted that:

> "The Commission should order Natural to refund the excess revenues collected by reason of its 'normalized' treatment of liberalized depreciation for the entire period the inflated rates have been in effect; that is from March 1, 1961 to the present." (Appendix G, p. 79.)

The Commission asserts on page 4 of its Opinion No. 456 that:

> ". . . there is no language in the Settlement which can fairly be interpreted as requiring us to order refunds retroactive to the date the rate increase was put into effect by Natural." (R. 5128.)

This is clearly erroneous since the Settlement must be read in the setting of the Natural Gas Act. In *Texas-Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F. 2d 345, 347, 348 (1962), the United States Court of Appeals for the 5th Circuit stated:

> ". . . we recognize of course, that here as in every situation of contract interpretation the Court must put itself in the position of the parties. That means that we must read the Agreement in the setting of the Natural Gas Act".

Section 4(e) of the Natural Gas Act carries out the purpose of the Natural Gas Act to protect the consumer by allowing new rates to go into effect after a five months suspension period, subject to refund of any amounts found to be excessive to the date the change became effective.

C. The Decision of the Court Below and the Opinions of the Commission Overlooked the National Importance and Significance of This Proceeding.

Natural gas has become a necessity and no longer a luxury, if for no other reason than to help abate the ever-increasing air pollution problems which confront a substantial number of large metropolitan areas within these United States. Once a consumer is committed to this form of energy, he has made a capital expenditure which will allow him little choice among competing fuels. In recent years, consumers have become cognizant of their reliance on natural gas as an economical fuel and have demanded that they be represented by their state and local governmental agency in proceedings in which the rates of natural gas are determined.

To adjust to this mounting participation by consumer interests, State and Federal Commissions and all parties appearing before them, have resorted to the use of regula-

tory agency approved Settlements. This administrative tool will become untenable, if not completely avoided should this decision be allowed to stand. As the U. S. Court of Appeals for the Fifth Circuit, in *Texas-Eastern Transmission Corporation* v. *Federal Power Commission,* 306 Fed. 2d 345 at 347, 348 (1962) asserted:

> "... Commission approved voluntary settlements are an important and desirable mechanism as the Commission undertakes the staggering burden of dealing with the ceaseless flow of the ever-more complicated problems facing an inadequate staff as a result of the celebrated 1954 *Phillips* Decision. (*Phillips Petroleum Company* v. *Wisconsin,* 347 U. S. 672 (1954).) Consequently, settlements should be encouraged not discouraged."

The Court further stated:

> "... One sure way to discourage voluntary settlements is for the Commission at the behest of one party or the other, or ubiquitous ... intervenors, to read into contracts things which are simply not expressed or not there...."

Contrary to the admonition of the Court, this is just what the Commission did. It read its prospective-looking decision in *Alabama-Tennessee* into the Settlement Agreement in this case. Such action by the Commission, which was sustained by the Court of Appeals in 19604 and 19836, is contrary to the law as expressed in the decisions of the Federal Courts.

CONCLUSION.

Joint Petitioners respectfully request the opportunity to present these questions to the Court more fully. They are important questions of public law. Their resolution will have far-reaching effect.

They are questions affecting millions of citizens and involving billions of dollars.

Joint Petitioners respectfully submit that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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